DECISION

THE COMPTROLLER GENERAL
OF THE UNITED STATES
WASHINGTON, D.C. 20548

FILE: B-136530 DATE: January 6, 1978

MATTER OF: Interpretation of 1954 Cargo Preference Law, 46 U.S.C. 1241(b)(1) (1970), Reconsideration, 55 Comp. Gen. 1097 (1976), affirmed.

DIGEST:

1. Even though cargo on U.S.-documented LASH barges is carried on privately-owned U.S.-flag commercial vessels[(LASH) mother ship], cargo carried on a combination of those LASH barges and a foreign-flag FLASH unit is not carriage on privately-owned United States-flag commercial vessels for the purposes of the 1954 Cargo Preference Law.

2. Even though ocean carrier's LASH/FLASH operation was analogous to its competitor's breakbulk operations, there is a significant difference in competitor's use of foreign-flag vessels for delivery of 10 to 20 miles in the port area to perform lighterage and in ocean carrier's LASH/FLASH system's use of those vessels for transportation and delivery to the port area from about 200 miles away.

3. Prior opinion did not depend on the particular U.S.-flag service used; it depended on fact that port-to-port breakbulk service was available on privately-owned United States flag vessels; thus the particular port configuration appears a mere excuse for use of foreign-flag FLASH unit.

4. Decision is in accord with regulations issued by Maritime Administration to implement uniform administration of 1954 Cargo Preference Law.

Central Gulf Lines, Inc. (Central Gulf), requests reconsideration of our decision in 55 Comp. Gen. 1097 (1976). The Assistant Secretary for Maritime Affairs, United States Department of Commerce has joined in the request for reconsideration.

The decision concerned Central Gulf Lines, Inc. (Central Gulf), which operates a U.S.-flag LASH (Lighter Aboard Ship) service to Southeast Asia, and which guarantees direct delivery to the port of Chittagong in Bangladesh. However, its mother ships, which have an overall length of 893 feet and a design draft

of over 40 feet, cannot navigate the Karnaphuli River on which Chittagong is located. The bar at the mouth of the Karnaphuli varies from a low of 21 feet in low water season (February) to a high of 30 feet (July and August). Additionally, only vessels up to 580 feet in length can navigate the river. Thus, Central Gulf's vessels are forced either to utilize the open sea anchorage off the mouth of the river or to unload their barges at the nearest safe, protected anchorage and tow the barges to Chittagong.

The carrier stated that this open sea anchorage is not sufficiently safe for the discharge of LASH barges, especially during the monsoon season. The nearest deepwater protected anchorage is the port of Kyaukpyu, Burma, approximately 200 miles from Chittagong. Central Gulf planned to unload the barges from its mother ships at Kyaukpyu into a foreign-flag FLASH (Float On/Float Off Feeder Lash Vessel) system and tow them to Chittagong.

We held in our decision that LASH services to be performed partly with privately owned United States-flag commercial vessels and partly with a foreign-flag FLASH system to deliver certain Government-sponsored cargoes to port of Chittagong in Bangladesh contravenes the 1954 Cargo Preference Law because direct service to Chittagong is available by U.S.-flag breakbulk vessels and because special circumstances (here, the geographic configuration of the port precluding the use of normal LASH unloading operations) cannot be used to circumvent the cargo preference laws.

Central Gulf requests reconsideration primarily on the basis that the LASH lighters are themselves United States commercial vessels and that the flag of the mother ship is irrelevant.

The 1954 Cargo Preference Law requires cargo to be carried "on privately-owned United States-flag commercial vessels," and Central Gulf simply argues that since the cargo is being carried on a LASH barge, and since the LASH barge is a documented vessel under the law of the United States, there has to be carriage "on privately-owned United States-flag commercial vessels." Wirth Ltd. v. S.S. ACADIA FOREST, 537 F. 2d 1272 (5th Cir. 1976), is cited in support.

Wirth Ltd. was concerned with liability for damage to cargo occurring when a LASH barge was being towed from origin to its

mother ship for ocean transportation to destination. In ascertaining whether there was liability for cargo damage, it made a difference whether or not the LASH barge was classified as a "ship" under the Carriage of Goods by Sea Act (COGSA), 46 U.S.C. 1300 et. seq. (1970). In concluding that the LASH barge was a ship under COGSA, the court in Wirth Ltd. obviously was impressed with the need for a uniform standard of cargo liability whether the LASH barge was on or off the mother ship because it said, "* * * the carrier should have the same statutory duties and exemptions during both stages of transport." 537 F. 2d 1272 at 1279. The easiest way to achieve uniformity is to focus strictly on the LASH barge as being the carrying ship or vessel of the cargo, regardless of whether it was on or off the mother ship, which is exactly what the court did. The court was not concerned with and made no attempt to answer this question: What kind of an entity, foreign-flag or U.S.-flag, is the combination of a foreign-flag mother ship and U.S.-flag LASH barge? It was essentially concerned with the LASH barge by itself.

Port Royal Marine Corp. v. United States, 378 F. Supp. 345 (S.D. Ga. 1974), aff'd mem., 420 U.S. 901 (1975), aff'g the decision in 344 I.C.C. 876 (1973), makes clear, however, that the LASH barge's position on or off the mother ship--its relationship to the mother ship--can be a critical event for another purpose. In Port Royal the issue was whether the Interstate Commerce Commission (ICC) had jurisdiction over the towing of the LASH barge in United States waters after it had been discharged from the mother vessel or en route to be put on the mother vessel. The determination of the jurisdictional issue depended on whether during the discharge or picking up of the LASH barge by the mother vessel there was a transshipment of the cargo carried on the LASH barge. As the court stated:

> "The movement of cargo by ocean-going vessels to a central mooring point in this country where floatable cargo containers are discharged from the mother ship and are towed by tug to destination may not constitute 'transshipment' in the traditional sense. But that term, as employed in Part III [of the Interstate Commerce Act], is neither a word of art nor one to be parochially construed. Transshipment contemplates a significant, identifiable change in the nature,

> the mode and the conveyance used in the carriage of cargo. The statutory meaning of transshipment has the capacity to accommodate itself to technological advances transforming the method thereof although producing the basic result obtained by traditional means in the transshipping of cargo. * * * Unquestionably, the cargo stored in the container-barges is turned over to the exclusive control of Port Royal's towing vessel and remains in its care until the lighters are returned to the mother ship when control is surrendered to her owner." 378 F. Supp. at 352-353.

The court in Port Royal decided that a "transshipment" did occur because it focused on the LASH barge's relationship with the mother ship (in our case with the FLASH unit) rather than upon the LASH barge itself as the carrying vessel. Even though a "transshipment" for ICC jurisdictional purposes may not be equivalent to a "transshipment" for some other purposes, neither the Port Royal nor the Wirth Ltd case controls the outcome of the particular statutory construction problem involved here. Both cited cases are instructive, though, about the different perspectives that can be used in looking at the overall LASH operation, depending upon the question involved.

The Assistant Secretary for Maritime Affairs also rejects Central Gulf's argument that the documentation of the LASH lighters is the only relevant inquiry. He states in his request for reconsideration,

> "The goal of cargo preference legislation is to protect and foster the development of all aspects of the domestic maritime industry, including labor and shipbuilding, and since the manning of an intermodal system and the substantial share of the capital investment and construction work relate to the motherships and not the LASH barges, the results which could obtain from a contrary holding [that U.S. documentation of LASH barges by itself qualifies the system as a U.S.-flag commercial vessel] would be inimical to our interests."

Obviously, the carriage of cargo on U.S.-documented LASH barges in self-propelled foreign-flag mother ships from the port of origin most or all of the way to destination would not protect and foster the development of all aspects of the domestic maritime industry and therefore would not be carriage on "privately-owned United States-flag commercial vessels" for the purposes of the 1954 Cargo Preference Law. Even though carriage of cargo on U.S.-documented LASH barges in the non-self-propelled foreign-flag FLASH mother ship would not represent as great a loss of capital investment and construction work to domestic maritime industry as would the carriage of cargo on a self-propelled foreign-flag mother ship, we believe the integrity of the U.S.-flag system must be maintained for the 50 percent preference cargo reserved to U.S.-flag commercial vessels and that the combination of U.S.-documented LASH barges and the foreign-flag FLASH mother ship is not a U.S.-flag commercial vessel.

The Assistant Secretary argues in his request for reconsideration that we had misunderstood the factual situation and failed to appreciate that Central Gulf's LASH operation was essentially the same as the operations of Central Gulf's breakbulk competitors. The Assistant Secretary states that:

> "* * * the requirements of section 1241(b)(1) are satisfied quite fully where the U.S.-flag vessel involved makes the closest possible physical approach to the destination following a lengthy ocean voyage, and then transships or lighters cargo to pierside, even though such transfer is routed on foreign-flag vessels because of the unavailability of U.S. flag [sic] services to complete the movement."

He justifies the closest possible physical approach theory as being the only theory which allows even Central Gulf's competitors to participate in the Chittagong trade because they too are required to use foreign-flag vessels to complete the last 10 or 20 miles of the shipment to the piers at Chittagong.

We believe that even though the physical operation of Central Gulf and its breakbulk competitors in transferring the cargo to foreign-flag vessels for carriage to the piers at Chittagong may

be analogous, there is a significant difference in the performance of lighterage service in using foreign-flag vessels for delivery in the last 10 to 20 miles of the shipment in the port area and using foreign-flag vessels for transportation service to the port area from approximately 200 miles away. We would characterize the breakbulk operator's delivery as direct delivery to the destination port because the delivery arrangement with foreign-flag vessels occurs in the port area. We understand that there are several ports throughout the world in which delivery from the vessel to the pier is customarily accomplished by foreign-flag lighters of some sort in the port area. Port Royal Marine Corp. v. United States, supra, makes clear that lightering operations in U. S. waters which would normally be considered a transshipment requiring the exercise of jurisdiction by the Interstate Commerce Commission are ignored by the Commission as "terminal transportation" if performed within a harbor or between contiguous harbors. Without trying to define precisely the extent of the water area around the piers that is still within the harbor (it probably would vary with the individual characteristics of each port), we believe that this concept of "harbor area" for terminal operations can be transformed into a "port area" for delivery purposes so that once the delivering vessel reaches this port area, it has delivered to the port, and it does not make any difference how the cargo is placed upon the pier. It appears that the open roadstead 10-20 miles away from the piers at Chittagong would be included within that "port area" concept, but that the anchorage that Central Gulf uses at Kyaukpyu, Burma, over 200 miles away, would be outside the port area. Cf. Sacramento-Yolo Port District, Petition, 341 I.C.C. 105 (1972) where an anchorage approximately 60 miles away was held to be outside the "harbor area" for transshipment purposes.

The Assistant Secretary also points out that in our decision we relied to a great extent on opinions concerning the question whether particular cargoes rather than a particular U.S. flag service contravened 46 U.S.C. 1241(b)(1). That is true. But the opinion did not turn on the particular U.S.-flag service used. Central Gulf's FLASH units are part of its LASH service in the Southeast Asia trade and were designed to overcome the difficulties inherent in delivering its LASH barges to ports with configurations like those serving Chittagong. Since port-to-port breakbulk service is available on privately-owned United States flag vessels, it seems to us that the port configuration at Chittagong becomes

an excuse for the use of the foreign-flag FLASH unit. The unit could have been manufactured in the United States and, as pointed out in the decision, under certain circumstances the FLASH unit could qualify for preference cargo. 55 Comp. Gen. 1097, 1102 (1976).

The Assistant Secretary contests our conclusion of the immateriality of the lighterage involved in Central Gulf's competitors' services. He states that the foreign-owned ocean going vessels performing the lighterage service traditionally receive in excess of 10 percent of the gross ocean freight revenue (the rate at times exceeds 50 percent). While the lighterage costs may be costly due to the competitive peculiarities of the trade, it seems unquestioned that the lighterage operation is performed in a port area. As we said in discussing the Assistant Secretary's closest possible physical approach theory:

> "* * * there is a significant difference in the performance of lighterage service in using foreign-flag vessels for delivery in the last 10 to 20 miles of the shipment in the port area and using foreign-flag vessels for transportation service to the port area from approximately 200 miles away."

We note that the 1954 Cargo Preference Law originally provided no coherent system of administering the law. To remedy this and to collect information that might be useful in phasing in a system of subsidizing shipments subject to the law, Congress passed Section 27 of the Merchant Marine Act of 1970, 46 U.S.C. 1241(b)(2). Section 27 gave the Department of Commerce the duty of issuing regulations relating to the administration of programs under the 1954 Cargo Preference Law. See 1970 U.S. Cong. & Adm. News 4188, 4232.

The regulations (issued by the Maritime Administration) are published at 46 C.F.R. 381 (1976). Section 381.3 of those regulations requires the reporting of certain information about each shipment of preference cargo, including the name of the vessel, the vessel's flag of registry, the date of loading and the port of final discharge. The regulations provide for the name of only one vessel and only one date of loading in conjunction with the port of final discharge. Since we do not

believe that we can ignore the foreign-flag FLASH segment of the shipment, it thus would appear that shipments scheduled over that part of Central Gulf's LASH services to Southeast Asia which use a foreign-flag FLASH unit for part of voyage (in our case Chittagong is the port of final discharge rather than Kyaukpyu) would not in any event be considered preference cargo for the reporting requirements of the regulations. Thus, our decision is in accord with those regulations.

Our decision in 55 Comp. Gen. 1097 (1976) has not been shown to have been in error otherwise and is affirmed.

For the Comptroller General
of the United States